



San Diego Bay Council

A coalition of San Diego environmental organizations dedicated to protection and restoration of San Diego's Coastal water resources

September 7, 2010

via Electronic Mail to:

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**RE: Riverside County Municipal Storm Water Permit Reissuance
Tentative Order No. R9-2010-0016**

Dear Mr. Gibson:

Please accept these comments on behalf of the San Diego Bay Council (“Bay Council”), a coalition of environmental organizations dedicated to the protection and restoration of regional coastal waters in San Diego. Member organizations, representing 22,000 San Diegans, act through community involvement, regulatory participation, and legal action to ensure the protection restoration of San Diego Bay, Mission Bay, and the region’s coastal waters.

The Bay Council appreciates and welcomes the opportunity to comment on the Regional Water Quality Control Board’s (“Regional Board”) draft Municipal Storm Water Permit (“Permit”) for Riverside County. As with the recently adopted Orange County permit (Order No. R9-2009-0002), this draft Permit represents a significant improvement to past storm water permits in not only the San Diego region, but the entire state. The Bay Council applauds the Regional Board for its leadership in advancing municipal storm water permits to reflect the iterative approach of the maximum extent practicable (“MEP”) standard mandated by the Clean Water Act.

I. Permit Improvement Highlights

Although the Bay Council is composed of local San Diego organizations, it nonetheless has great interest in the Permit, as it will pave the way for the forthcoming San Diego County municipal storm water permit and perhaps the regionwide permit. (Permit Findings. E.12.). Moreover, the Santa Margarita Watershed links Riverside and San Diego Counties. Therefore, the Bay Council is pleased to see the Regional Board continue its progress in developing storm water permits that will result in greater protections for water quality throughout the region. These areas warrant specific mention.

A. Hydromodification Requirements Are More Protective

Bay Council member San Diego Coastkeeper was part of the Technical Advisory Committee for the San Diego region Hydromodification Management Plan (HMP) development. Many of Coastkeeper’s concerns, as well as committee member NRDC’s, focused on the standard set in the San Diego HMP. The hydromodification susceptibility and the resulting BMP sizing tools were set to meet predevelopment standards, not the naturally occurring condition. It was ultimately the San Diego MS4 Permit language—which defines predevelopment as the condition onsite immediately before the

planned development—that constrained the development of the HMP. (Order No. R9-2007-0001, C-7). This Permit, however, is in line with Coastkeeper and NRDC’s view that predevelopment and pre-project are the naturally occurring condition—as opposed to simply the condition immediately preceding the new development. This definition will create a more robust and effective HMP for the Riverside area, protecting natural stream hydrology as opposed to merely preventing further degradation. (Permit, F.1.h). Further, the required prioritization of BMPs will ensure the most effective BMPs are evaluated first, instead of the least expensive or easiest to implement BMPs. (Permit, F.1.g.(2)).

B. Unpaved Road BMPs and Flood Control Maintenance Requirements Are a Welcome New Addition

A new addition to this Permit is the regulation of unpaved roads, which now require implementation of BMPs. (F.1.i.; F.3.a.(10); F.3.c.(5)). Not only will these new permit provisions help alleviate sediment and erosion problems; they will also promote smart maintenance and planning. For example, the permit requirement that BMPs include “[u]npaved roads and culvert designs that do not impact creek functions and where applicable, that maintain migratory fish passage” will help maintain natural water courses. (F.1.i). The following requirement will also serve to promote long-term maintenance and planning to protect water quality and geomorphology:

Through their regular maintenance of unpaved roads, the Copermittees must examine the feasibility of replacing existing culverts or design of new culverts or bridge crossings to reduce erosion and maintain natural stream geomorphology.

(F.3.a.(10)(e)). These types of Permit conditions will incentivize municipalities to plan ahead, and will prevent the perpetuation of the currently fragmented maintenance activities.

In addition, municipal flood control structure BMP implementation will also serve to benefit Copermittees in maintaining their storm water systems. (F.3.a.(4)(a)-(c)). The requirement that Copermittees assess flood management project impacts on water quality, evaluate existing flood control structures as part of ongoing maintenance, and inventory such activities in the JRMP Annual Report is particularly important to avoid poor planning such as evidenced in the City of San Diego’s Master Storm Water System Maintenance Program. (Id.)

C. Retrofit Requirements Will Expedite the Water Quality Improvement Process

Largely ignored in the past, the retrofit requirements in the Permit will help Copermittees tackle the storm water issues that cannot be solved through new construction and development standards alone. Many water quality issues are historical, due to poor planning and the proliferation of impervious surfaces. Permit-required assessment of retrofit opportunities, and permissive language with regard to implementation of retrofits will spur Copermittees to action, but allow them flexibility to choose the most effective projects. (F.3.d.). The novel idea of using retrofits as an enforcement or mitigation measure will also likely prove more appealing than simple monetary penalties.

D. The Removal of Over-Irrigation as an Exempt Non-Stormwater Discharge Addresses Both Water Quality and Water Supply Issues

Bay Council has been collectively, and through its individual organizations, advocating for conservation and smart water use for years. Every drop of water that remains at its source is a drop that has not contributed to urban runoff. Nonetheless, many municipalities have been reluctant to enforce over-irrigation as either a water supply or water quality issue, citing the previous permit

exemption as authority for such practice. Now, with the removal of this exemption, municipalities will not only be required to enforce over-irrigation runoff, but will be able to use the revised Permit as authority for urging residents, developments, and commercial and industrial facilities to conserve water.

E. Numeric Limits Will Help Assess Water Quality Improvements and BMP Effectiveness

As with the Orange County permit, this Permit is a great leap forward in achieving the MEP standard. With the Orange County permit paving the way, the Regional Board has created a mechanism to evaluate BMP effectiveness and ensure the iterative approach is truly progressive. As Bay Council members have previously commented on the Orange County permit, the Regional Board has broad authority to impose numeric effluent limits.¹ The Bay Council fully supports the Regional Board in requiring both non-storm water dry weather action levels (“NALs”) and storm water action levels (“SALs”). (Permit, C. and D.).

II. Copermittees Must Stop Using Cost as An Excuse For Non-compliance

Though the Permit, as other past permits, requires a Fiscal Analysis, the Copermittees are surely to view this component of the Permit as another draconian measure that requires them to “check the box” as opposed to viewing this Permit condition as a tool. Copermittees should rather use the Fiscal Analysis requirement to plan ahead, financing necessary projects and measures not only for Permit compliance, but to achieve actual water quality improvements. (H.1.).

The current practice with respect to the Fiscal Analysis component of storm water permits is exemplified in the City of San Diego’s 2009 Annual Report. This Report provides a “Future Projection” analysis consisting of two paragraphs which simply reiterate funds are generated from general fund and non-general fund sources, and costs will continue to rise.² Earlier in the same section, the City provides an explanation of how funds are generally used, but provides no insight into the amount of money applicable to each funding source.

Such cursory fiscal analysis is common in Annual Reports, while municipalities refuse to face the real problem. They continuously fail to adequately pass on the true costs of compliance. Time and again, environmental groups and the Regional Board are faced with the same excuse: protecting water quality and restoring beneficial uses is too expensive. From Permit approval to Permit implementation, the same excuse persists. Nonetheless, the reluctance of the Copermittees to adequately fund their respective storm water programs is not the result of a lack of desire to improve water quality by municipal staff or managers, but rather poor decisionmaking and lack of political will. Decisionmakers at the city and county level must pass their costs on to those reaping the benefits. Recent news articles highlight the City’s reluctance to increase storm water fees, requiring 95 cents per month per residence across the board, while to recoup its costs, the City should be charging \$3 per month.³

Now is the time for the Regional Board to clearly articulate in the Permit: noncompliance due to cost will not be tolerated. The Permit is a tool underutilized by Copermittees to obtain necessary funds

¹ *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d. 1159; 1166-67 (“Under 33 U.S.C. § 1342(p)(3)(B)(iii), the EPA’s choice to include either management practices or numeric limitations in the permits was within its discretion.” citing *Natural Resources Defense Council, Inc. v. United States EPA*, (9th Cir. 1992) 966 F.2d 1292, 1308); see also, *City of Abilene v. United States EPA*, (5th Cir. 2003) 325 F.3d 657, 661.

² <http://www.sandiego.gov/stormwater/pdf/urmp09ar.pdf> (p. 10-4).

³ http://www.voiceofsandiego.org/government/article_f4be2cbd-c631-51fc-a428-a7e64773eac4.html;
http://www.voiceofsandiego.org/government/thehall/article_4531d4ce-95ba-11df-8ab8-001cc4c03286.html;
<http://www.sdcitybeat.com/sandiego/article-8041-show-us-the-money.html>

and plan for the future. If the Copermittees once again fail to use Permit section H., they risk enforcement action. We urge the Regional Board to make clear that noncompliance due to cost is not an excuse. After almost three decades, Copermittees should no longer be allowed to claim poverty as an excuse for post-approval weakening of permits and the requirements therein.

III. Specific Permit Areas Require Further Improvement

Notwithstanding the many advances in the current permit, a few aspects of the permit remain incomplete. Our specific comments and suggestions with respect to these topics are below.

A. Residential Carwashing Should Not Be an Allowed Non-Stormwater Discharge

Individual residential car washing is currently listed as exempt from the prohibition against non-stormwater discharge. However, this allowance contradicts other permit sections that evidence the negative water quality impact residential car washing poses. Indeed, car washing is specifically listed as a threat to water quality in the residential permit section. (F.6.b.(3)). It is also provided as an example topic for discussion in the education component for residential and general public outreach. (F.6.b.(4)). Clearly a threat to water quality, and a water supply issue, residential car washing should not be made exempt simply because it requires a change in public behavior. Just as over-irrigation should not be exempt non-storm water, neither should this source of urban runoff.

B. NAL Requirements Are Too Lax

As mentioned above, the Bay Council is extremely supportive of the inclusion of NALs and SALs in this Permit. However, the vague Permit language leaves much to be desired. The Permit requires investigation and source identification for a NAL exceedance in a “timely manner”. (Permit C.2. and C.3.). It is entirely unclear what constitutes a “timely manner”. Further, because the NALs are an illicit discharge identification and elimination tool, time is of the essence. (C.2.b.). In many instances, a NAL exceedance must be investigated contemporaneously with the return of monitoring results, or the source will evade detection. Therefore, the Regional Board should impose a strict numeric deadline for “timely action”. We suggest the Copermittee begin investigation of the source of the exceedance the business day following receipt of the monitoring results. The investigation should be expedited, and should not take more than two weeks.

In addition, development of the monitoring plan for dry weather is largely left to the Copermittees. (Permit, Attachment E, C.1.b.). Sampling frequency must simply be “representative” of major outfalls and identified stations within each hydrologic subarea. (Id.). The actual frequency of sampling is not mentioned at all. As with most plans developed by Copermittees, this monitoring plan will surely be greatly and artificially constrained by costs. Therefore, we urge the Regional Board to set a minimum monitoring frequency that is scientifically sound, as opposed to a cost-driven frequency.

C. Publicly and Electronically Available Documents and Monitoring Will Help Inform the Public and Regional Board, and Reduce Annual Report Burdens

Most Copermittees expend tremendous resources on preparing and submitting their Annual Reports, but view this requirement as overly burdensome and largely an exercise in futility. After reading numerous and varied municipality Annual Reports, we tend to agree. Annual Reports are massive documents with surface-level detail, no depth, and very little substance. Copermittees are loath to point out any failures or inadequacies in their storm water programs, and virtually never

highlight deficiencies. Instead, systemic issues such as lack of enforcement and funding, evident during field visits, remain unmentioned in Annual Reports.

Therefore, the Bay Council suggests a more appropriate tool for public involvement, reporting, and monitoring progress would be real-time or quarterly electronic reporting. The State Water Resources Control Board has moved into the digital age, making a variety of documents and reports publicly available via the internet.⁴ We encourage the Regional Board to work with Copermittees, utilizing the permissive Permit language to explore such a possibility. Neither the Regional Board, nor the individual Copermittee, is served by rigid reporting requirements that result in largely unread or useless documents. (Permit, K.)

Specifically, the dry and wet weather monitoring results should be available publicly online as soon as the results are received. NAL and SAL exceedance real-time reporting would benefit Copermittees as the public could aid in investigations or prove an otherwise valuable source of information. Such real-time reporting might also prove a successful deterrent to illicit discharges. The Copermittees should further report inspections, BMP maintenance tracking, and SSMP project inventories quarterly. Construction site, municipal, industrial, and commercial inspections should also be reported quarterly. This type of information is invaluable to the public and the Regional Board, but is largely unavailable to either as Annual Reports are an attempt to summarize such information compiled over long periods of time. Smaller doses would prove more useful and easily digestible.

D. HMP Exemptions Will Prevent Rehabilitation of Channelized Streams

As with the San Diego HMP, the exemption for conveyance channels whose bed and bank are concrete lined all the way from the point of discharge to water storage reservoirs and lakes will prevent rehabilitation of these areas, especially in light of the retrofit requirements elsewhere in the Permit. (Permit, F.1.h.(4)(b)). Moreover, this exemption encourages continued channelization efforts. We urge the Regional Board to remove this exemption.

E. The Regional Board Should Develop Plans – Rather Than Copermittees

With the HMP and with all other plans required by the Permit, such as monitoring, it is imperative that the Regional Board play the lead role. Bay Council understands, given budget constraints and furlough restrictions, the Regional Board has fewer resources and more work to do. Nonetheless, as permit requirements are delegated to Copermittees for development and planning, water quality suffers and NGOs and the public are left out of the process.

As with the San Diego HMP, this Permit requires Copermittee-driven HMP development. However, the San Diego process serves to shed light on the likely result: an artificially cost-constrained plan with frequent exercise of exemptions. Therefore, it is critical that the Regional Board play a lead role in the development of the HMP and all other plans.

If the current practice remains, Copermittees will expend large sums of money in developing a plan made publicly available (and indeed reviewed by the Regional Board) at the end of the process. Often the Regional Board and public are faced with two equally unappealing options: force the Copermittees to start anew and delay implementation; or accept an inadequate plan. The final product in this type of planning further represents a financial commitment by Copermittees. Because of this financial investment, Copermittees that may have been able to proceed in a different direction at the

⁴ Geotracker, DMR, CIWQS, and ESI.

beginning stages of development, are unable to afford (or unwilling to pay for) repeating the process after the plan is fully developed.

A possible remedy is a cost-share plan, or outside consultant who is employed by the Regional Board, reports to the Regional Board, but is paid via Copermittee funds. In order to foster a truly public process, and scientifically driven compliance (as opposed to cost-constrained), the Regional Board must remain the ultimate decisionmaker, with staff developing plans—not Copermittees.

Therefore, we urge the Regional Board to commit to heavy oversight if not a cost-share mechanism to take charge of the development of these plans in order to ensure timely completion and true advancement of water quality.

F. The Watershed Water Quality Workplan Presents A Unique Opportunity for Public Involvement

The Permit requires identification of sources causing the highest water quality problems within the Upper Santa Margarita Watershed. (Permit, G.1.c.). A relatively easy aid to identification of such sources is expanded public outreach. We urge the Copermittees to survey the public and NGOs in the area in ranking water quality problems. In addition, Copermittees should provide bilingual public notice of annual watershed workplan meetings by sending such notices directly to area residents or holding special semi-annual workshops, especially in underserved communities. Copermittees might find the public particularly useful in source identification and BMP implementation strategies. This could further serve as an effective tool to meet the education and public participation Permit requirements. (Permit, G.4.). Lastly, we urge the Copermittees in Riverside County to reach out to Copermittees in the lower portion of the Watershed to coordinate source identification and monitoring activities.

IV. Conclusion

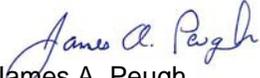
The San Diego Bay Council applauds the Regional Board for many of the Permit measures, while offering suggestions for needed improvements. We look forward to continued participation in the review process and approval hearing. Thank you for your consideration of these comments.

Sincerely,


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